

IS LAW ABLE TO TRANSFORM SOCIETY?

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I INTRODUCTION

In this article I discuss the relationship between a given ‘society’ and the ‘official state law’ applicable to that society, with a view to ascertaining to what extent official state law may be used to steer or change a society in a particular way. I do not have in mind what Dror calls the ‘indirect’ use of law in social change,¹ but will rather focus on the direct use of law in transforming society.

Dror quite rightly points out that large-scale bureaucratic societies almost always indirectly rely on laws to bring about change.² To promote a particular form of social change, a public body may be set up with the purpose of bringing about this result. A law would be passed, setting up that body and establishing its powers. For example, education may be used to steer a society in a particular direction, but a law would first have to be passed that sets up educational institutions and creates a duty to attend these institutions.³ If the state wanted to utilise the law to combat poverty, creating a legal obligation to attend primary and secondary schools would amount to the indirect use of ‘the law’ to achieve the desired result, because it is the benefits accruing to a better education that leads to a better chance of being employed.⁴ Hence, the legal command to attend a school indirectly facilitates the implementation of state policy in increasing school attendance. To put it differently, the ‘effective cause’ of societal change in this case would have been ‘education for more people’, not the Act of Parliament which obliges children to attend school.

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¹ Y Dror ‘Law and Social Change’ (1958) 33 *Tulane LR* 787 at 798.

² *Ibid.*

³ *Ibid.* To Dror’s examples may be added the following grand schemes as described by J C Scott *Seeing Like A State: How Certain Schemes to Improve the Human Condition Have Failed* (1998) that could or would have been established ‘via’ law: compulsory ujamaa villages in Tanzania; collectivisation in Russia; Le Corbusier’s urban planning theory realised in Brasília; the ‘Great Leap Forward’ in China; and agricultural ‘modernisation’ in the tropics.

⁴ H Bhorat & R Kanbur ‘Introduction: Poverty and well-being in post-apartheid South Africa’ in H Bhorat & R Kanbur (eds) *Poverty and Policy in Post-Apartheid South Africa* (2006) 1 at 8.

(Sustained) court action would usually amount to the direct use of the law to bring about a concrete result. Handler lists certain (positive) indirect effects of litigation. He states that it provides publicity, legitimises values and goals, and may be used as part of broader campaign.⁵ He argues that litigation may be used as leverage, and that litigation may be used to bring a halt to a particular action, thus increasing the party's bargaining power. Seen from this perspective, the eventual court order is not the end of the matter, but part of a broader strategy.⁶ Handler states that litigation may generate harmful publicity that may force the discriminator into settlement, which would be some consolation to a claimant that is not able to proceed with the court case to finality because of the duration or costs involved.⁷ He seems to argue that litigation may be used as a form of 'consciousness raising' and that litigation can contribute to a change in public opinion.⁸ I would argue that some of these benefits are easier to assert than to prove empirically,⁹ that many of these benefits would only accrue in very specific cases, and that in some instances it would be impossible to clearly link the benefits to the litigation.¹⁰ I therefore do not intend to theorise about the potential or imagined benefits of the indirect use of the law, but will primarily be interested in how the *actual outcome* of the *direct use* of law may bring about societal change.

When speaking of the direct use of law, Dror has in mind 'a revolutionary or intellectual *minority*' that 'obtains legislative power and uses it in its efforts to bring about extensive changes in social structure and culture'.¹¹ But the same question could be asked of a previously disenfranchised, marginalised

⁵ J F Handler *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978) 209–10.

⁶ *Ibid* at 212.

⁷ *Ibid* at 214.

⁸ *Ibid* at 218–19.

⁹ How would one measure whether 'consciousness raising' occurred? A Sen 'Normative Evaluation and Legal Analogues' in J N Drobak (ed) *Norms and the Law* (2006) 247 at 254 seems to argue in a similar vein. He suggests that many human rights can serve as important constituents of social norms, and have their influence and effectiveness through 'personal reflection' and 'public discussion', without their being necessarily diagnosed as pregnant with potential legislation. My argument would again be that this 'influence and effectiveness' seems to be theorised or imagined and is not susceptible to empirical proof.

¹⁰ E.g. a change in public opinion.

¹¹ Dror op cit note 1 at 799. Dror has in mind 'Japan and Turkey, where whole parts of Western law were received with the intention thus to further the Westernization of these countries, and this was also the case in Soviet Russia. To some extent the efforts of the various colonial powers, especially France, to introduce their law into various territories under their rule was also motivated by the desire to shape the social realities of those places, as was the enactment of Prohibition in the United States.' Legislated apartheid would, to my understanding of Dror's definition, not amount to this kind of use of the law, as Dror specifically addressed attempts at *changes* in social structure and culture. Apartheid did not fall out of the sky in 1948 with the coming to power of the National Party and was not an attempt to force *new* patterns of behaviour onto South Africans — it may be argued that in 1948 South Africa was already a de facto segregated state.

and powerless *majority* that suddenly obtains legislative power: to what degree could official state law be used effectively in steering society in the desired direction?

Below I discuss nine overlapping themes, all sharing the same pessimism about the potential role of law in transforming society.¹² That is not to say that law has *no* impact in changing a society. My contention is more subtle — law's transformatory potential is often overestimated.

II COMPLEXITY

It is a complex task to use the law as an agent of change.¹³ Compare Morison's view (emphasis added):¹⁴

'We do not have very much by way of a theory *and the sheer number and complexity of the many forces to be understood and deployed* ensures that the theory of the art of statecraft is likely to remain beyond the reach of any modern Machiavelli hoping to educate his Prince.'

Chemerinsky argues that change (if it occurs) will probably take place over the long term. In addition, the more far-reaching the intended change, the longer it will take, and the greater will be the variables that will play into the process.¹⁵ Tamanaha notes that the relationship between law and society is too complex to address in a single formula and that one has to simplify

¹² Some authors describe law as a 'blunt' or 'limited' tool but do not provide particular reasons. Cf J Gardner 'Private activities and personal autonomy: At the margins of anti-discrimination law' in B Hepple & E M Szyszczak (eds) *Discrimination: The Limits of Law* (1992) 148 at 168–9; T Loenen 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13 *SAJHR* 401 at 427 (she doubts whether any other legal concept could reach the more fundamental levels of gender and race relations and views law, by its nature, as a limited instrument in changing social reality); H Burns 'Black people and the tyranny of American Law' in C E Reasons & R M Rich (eds) *The Sociology of Law: A Conflict Perspective* (1978) 353 at 361 (he believes that law is a valuable tool but should not be seen as the only tool; law is only 'a component in a much larger change process').

¹³ J Morison 'How to change things with rules' in S Livingstone & J Morison (eds) *Law, Society and Change* (1990) 5 at 11: 'Law is better seen as a Heath Robinson contraption, a ramshackle device where creaking pulleys operate to overbalance buckets of water that trigger off other forces which in turn activate other processes with the final result that (possibly) an egg is boiled or a banana skinned. Change through law is difficult to plan, complex to execute and often uncertain in its consequences'; S Livingstone 'Using law to change a society: The case of Northern Ireland' in S Livingstone & J Morison (eds) *Law, Society and Change* op cit at 64: 'Using law to alter a society is a complex and difficult task'; Gardner op cit note 12 at 168–9 thinks that law is a blunt tool 'which destroys more readily than it creates' and that no quick fixes exist. Also cf T Koopmans *Courts and Political Institutions* (2003) 252 and G E Marcus 'Mass toxic torts and the end of everyday life' in A Sarat & T R Kearns (eds) *Law in Everyday Life* (1995) 237 at 255 ('reality is complex, almost unbearably complex').

¹⁴ Morison op cit note 13 at 13.

¹⁵ E Chemerinsky 'Can courts make a difference?' in N Devins & D M Douglas (eds) *Redefining Equality* (1998) 191 at 192–3.

drastically the relationship to begin an analysis.¹⁶ An obvious question is why one should bother to study such a ‘drastic simplification’ — such a simplified model would not be accurate because it is not true to reality. Kamenka and Tay note that only revolutions have simple programmes and that only simple programmes have a high probability of being successful — the more complex the operation the more things can go wrong.¹⁷ They put it bluntly: quick, pervasive or fundamental changes will not be achieved via the law.¹⁸ The argument is not that law has *no* impact, but that law’s impact will be limited: it will take time to have an impact, and it will not reach all of its stated or ostensible aims.

III UNFORSEEN CONSEQUENCES

Linked to the first theme, changes in law in one field may have unforeseen (and perhaps unwanted) consequences in other fields.¹⁹ Authors offer the following examples: Scott tells how a door-and-window tax was established in France under the Directory.²⁰ The idea behind the policy was that the number of doors and windows in a dwelling would be proportional to its size; the more doors and windows, the higher the tax. A tax collector would then not have to measure the house, but would merely have to count the doors and windows. However, peasants then developed their dwellings so as to have as few openings as possible, and the health of the rural population in France suffered for more than a century.²¹ Kidder explains how income ceilings, intended by the legislature to act as an incentive to *leave* public housing and move into private housing, actually provided a strong incentive to *remain* in public housing and to turn down better-paying employment: ‘if a moderate increase in family income forced a family out of public housing, their net gain might turn into a net loss because of the pricing effects of a private-housing shortage’.²²

Here the argument suggests that law may well have an impact, but not the impact that was intended. If unintended consequences occur, then the use of

¹⁶ B Z Tamanaha *A General Jurisprudence of Law and Society* (2001) 1.

¹⁷ E Kamenka & A E Tay ‘“Transforming” the law, “steering” society’ in E Kamenka & A E Tay (eds) *Law and Social Control* (1980) 105 at 115.

¹⁸ *Ibid.*

¹⁹ Cf Livingstone *op cit* note 13 at 64: ‘[C]hanges in one area, such as constitutional reform, may be undermined by problems in the application of law elsewhere, such as the security field. . . . However careful planning of a legal strategy and the likely resistances it will meet will not avoid every problem and legal changes will often have unexpected effects’. H Schäffer ‘Evaluation and assessment of legal effects procedures: Towards a more rational and responsible lawmaking process’ (2001) 22 *Statute LR* 132 at 141 admits defeat in the following terms: ‘Certainly, any enactment is a ‘shot in the dark’, because we know very little about the way law operates and the *interconnection* of the effects of legislation’. (My emphasis.)

²⁰ Scott *op cit* note 3 at 47.

²¹ *Ibid* at 48.

²² R L Kidder *Connecting Law and Society: An Introduction to Research and Theory* (1983) 137–8.

law has *failed* in its objective, which in turn indicates the limitations of the law in achieving its stated objectives. In the context of societal transformation, if it is, for example, true that affirmative action as contained in legislation has only led to the unintended consequence of creating a very small black elite, then it has failed if the aim was fundamentally to address black poverty.

IV INDIVIDUAL CHOICES

More specifically, changes in the law may have unintended consequences because any given society consists of various individuals faced with various choices and the impact of law on these individuals will be varied and almost impossible to control or predict.²³ Kidder argues that complex decision-making networks of law enforcers exist and that laws are filtered through these networks.²⁴ He points out that people are not isolated individuals that make isolated decisions, but that they function within a complicated network of family life and employment: it is not easy to predict law's effects on these individual decisions.²⁵ He presents an example illustrating the varying effect of a change in the law.²⁶ In 1948 the United States Supreme Court ruled that religious teaching could not take place in public schools. How did public schools react to this ruling? In all kinds of ways: some immediately stopped religious teaching; others camouflaged the fact that they were carrying on as they had always done; and others carried on without making any adjustments.

Kamenka and Tay state that the relationship between law and 'society' is further complicated by the fact that within 'society' various 'societies' co-exist.²⁷ These different societies either bind together or strain to get apart from one another; sometimes they agree with each other and sometimes they

²³ T Hughes 'South Africa: The contrarian big African state' in C Clapham, J Herbst & G Mills (eds) *Big African States* (2006) 155 at 162; F Fukuyama *The End of History and the Last Man* (1992) 47; D M Engel 'Law in the domains of everyday life: The construction of community and difference' in A Sarat & T R Kearns (eds) *Law in Everyday Life* (1995) 123 at 136; L M Friedman *The Legal System: A Social Science Perspective* (1975) 86 & 119; V Aubert *In Search of Law: Sociological Approaches to Law* (1983) 172; W Jeffrey jnr 'Sociologists' conceptualisations of law: A modest proposal for paradigm revision' in P J Brantingham & J M Kress (eds) *Structure, Law, and Power: Essays in the Sociology of Law* (1979) 27 at 33; N Luhmann *A Sociological Theory of Law* (1985) 249. Also see N Machiavelli *The Prince* (2003) 80: 'It can be observed that men use various methods in pursuing their own personal objectives. . . . One man proceeds with circumspection, another impetuously; one uses violence, another stratagem; one man goes about things patiently, another does the opposite; and yet everyone, for all this diversity of method, can reach his objective. It can also be observed that with two circumspect men, one will achieve his end, the other not; and likewise two men succeed equally well with different methods, one of them being circumspect and the other impetuous. This results from nothing else except the extent to which their methods are or are not suited to the nature of the times.'

²⁴ Kidder op cit note 22 at 127.

²⁵ Ibid at 137.

²⁶ Ibid at 117.

²⁷ Kamenka and Tay op cit note 17 at 106.

display bitter or violent conflict, and sometimes both occur at the same time.²⁸ Even within one individual within a given society, different motives and feelings compete or agree, only to agree or compete on another issue the very next moment. These complex inter-relationships between individuals and different societies cannot be reduced to a ‘fixed and finite pattern’.²⁹ Luhmann uses somewhat obtuse language to reach the same conclusion.³⁰ He argues that the ‘enforcement of the legislative will’ is filtered through numerous variables: the socio-economic system; ‘deviant’ legal subcultures (each with its own normative attitudes); and personality structures.³¹ These different variables lead to one legal text obtaining very different meanings, or various legal texts pointing to the same situation. All of these systems operate separately yet interdependently and all together form ‘social reality’. Every change in the law causes immeasurable effects — some positive, some negative; some short-term, some long-term — but each of these consequences are uncertain in the different systems and in relation to different functions. Unifunctionality is an illusion used only as an analytical tool.³² Luhmann presents the relationship between law and social structure as ‘cause and effect simultaneously’; sometimes societal changes take place while the law remains unchanged (although what happens with the legal rules may change), and sometimes new laws appear that do not change society.³³ The more complex a society becomes, the more the scope of this ‘relative invariance’ will probably increase.³⁴

Tamanaha refers to the work of what he calls ‘new legal pluralism’, which has shown that state law is only one order that operates in society alongside custom-based norms, rule-making and rule-enforcing institutions such as companies and universities, and smaller social groups such as clubs and perhaps even the family.³⁵ From this perspective (and I am echoing Ehrlich here³⁶) state law plays a very small role in the maintenance of social order, and will therefore also have a marginal effect in changing or steering society.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Luhmann op cit note 23 at 235–9.

³¹ Ibid.

³² Ibid.

³³ Ibid at 227.

³⁴ Ibid.

³⁵ Tamanaha op cit note 16 at 117.

³⁶ E Ehrlich *Fundamental Principles of the Sociology of Law* (1936) 21 talks of lebendes recht or ‘living law’, by which he means the rules actually followed in social life. The purpose of these rules is to avoid disputes. Should disputes arise, these rules aim at settling them without recourse to state courts. Yet a lawyer’s task is also to settle disputes. When would lawyers (and the courts) become involved? Ehrlich states that lawyers deal with the abnormalities of life, not the normalities. He thinks that state law is often irrelevant in securing order and harmony. People generally voluntarily (‘instinctively’) perform the tasks arising from social relationships and ‘as a rule, the thought of compulsion by the courts does not even enter the minds of men’. From this perspective of legal pluralism, state law plays a small role in the maintenance of the

V INADEQUATE GRASP OF THE PROBLEM TO BE SOLVED

Problem-solvers considering the use of law to solve a particular problem may not adequately grasp the problem. Most authors who take this line argue that some (or most) social ills cannot be adequately addressed via the law and at least implicitly argue that overambitious legislatures have contributed to the phenomenon of unenforced law.³⁷

VI VARIANCE WITH EXISTING CUSTOMS

Law should be grounded in existing customs; or, put differently, changes in law should follow changes in society or they will in all likelihood prove to be ineffective. This argument also implies that laws that stray too far from existing customs will not be followed, and hence may not be effective.³⁸ Laws that aim at far-reaching changes in current societal mores are therefore likely to be ineffective, at the very least in the short to medium term.

Morison points out that earlier writing on the relationship between law and society saw law as mirroring the populace's views, and that legislation would only succeed if it more or less conformed to what society wanted.³⁹ On this view, law has almost no role to play in effecting social change; rather, society changes and then law adapts to those changes. Morison quotes Sumner's 'stateways cannot change folkways' as a prime example of this approach to law and societal change. Morison states that from the 1960s and 1970s this view changed somewhat: writers rather attempted to identify the circumstances under which laws could be used to steer society (and when it could not) and writers in the field of sociology and law moved away from 'grand theories'.⁴⁰

An example that is often cited of a disastrous attempt at changing people's attitudes is American Prohibition. Despite a relatively high number of convictions and draconian penalties, alcohol consumption did not decrease significantly. Cotterrell lists a number of factors why this experiment failed: half-hearted enforcement by police; enforcement agencies lacked

social order, and therefore also will have a marginal effect in changing or steering society. For example, consider Ehrlich's rather strong view that 'one might reasonably maintain that society would not go to pieces even if the state should exercise no coercion whatever' (at 71).

³⁷ Livingstone op cit note 13 at 64; Ehrlich op cit note 36 at 375; A Allott *The Limits of the Law* (1980) 287; Gardner op cit note 12 at 168–9; L L Fuller 'Human interaction and the law' in K I Winston (ed) *The Principles of Social Order: Selected Essays of Lon L Fuller* (1981) 211 at 233.

³⁸ An often-quoted source in this regard is W G Sumner *Folkways* (1959). He is of the view that legislation must be grounded in existing customs and to be viable must be consistent with these folkways. Folkways only change as life's conditions change. Aubert op cit note 23 at 23 sees Sumner as a defender of the status quo, in contrast to Marxist scholars who would have been sceptical about using legislation to change society and would instead choose revolution to do so.

³⁹ Morison op cit note 13 at 5.

⁴⁰ Ibid at 6–7.

co-ordination and proper resources to prevail over organised crime; and neither the federal government nor the states set up proper enforcement machinery.⁴¹ The most important factor however, was the ‘social forces’ ranged against the attempt to outlaw alcohol.⁴² On the other hand, anecdotal evidence tends to suggest that South Africa’s smoking legislation is quite effective, even without being enforced. One reason may be that the vast majority of South Africans have come to accept that smoking is harmful, and do not smoke,⁴³ whether a law prohibits smoking in public or not. Put differently, social pressure and anti-smoking legislation reinforce one another.

Heyns sees the law as at best an instrument that expresses and summarises a society’s deeper held values.⁴⁴ Civil society and a culture of volunteerism hold a society together and steer it in a particular direction. Education about human rights values is more important than courts that enforce these values.⁴⁵ Internalised values steer society; values that are coerced at best create a temporary distortion.⁴⁶

Tyler notes that laws are set up to restrain self-interested individuals from actions that are destructive to society, and to co-ordinate individual behaviour (traffic laws being a good example).⁴⁷ Laws can only be effective if they are obeyed, and authorities must therefore be able to secure compliance. Tyler believes that a democracy depends on the voluntary compliance with laws by its citizens because the legal system has a limited ability to coerce or compel people into obeying laws. He refers to studies relating to drug use and drunken driving in the United States. Increased penalties for drug use and

⁴¹ R. Cotterrell *The Sociology of Law: An Introduction* (1992) 55–6. H. Richards ‘What makes effective laws? Commentary’ in H. Swain (ed) *Big Questions in History* (2006) 108 at 109 quotes Einstein as having said of the American experience relating to Prohibition that ‘nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced’.

⁴² Cotterrell op cit note 41 at 56. Koopmans op cit note 13 at 256 argues that Prohibition failed because the populace were unwilling or indifferent to the enforcement of the prohibition of ‘intoxicating liquors’.

⁴³ J. Griffiths ‘The social working of anti-discrimination law’ in T. Loenen & R. R. Rodrigues (eds) *Non-Discrimination Law: Comparative Perspectives* (1999) 313 at 322 notes that anti-smoking legislation is characterised by an almost complete absence of formal law enforcement, yet the legislation is obeyed. Griffiths states that the ‘social civility’ norms have already changed to incorporate a strong anti-smoking sentiment and that highly effective non-official enforcement is taking place. C. Desmond & G. Boyce ‘A healthy attitude?’ in U. Pillay, B. Roberts & S. Rule (eds) *South African Social Attitudes: Changing Times, Diverse Voices* (2006) 200 at 203 report that a 2003 HSRC survey on social attitudes indicated that 76 per cent of South Africans do not ever smoke.

⁴⁴ C. Heyns ‘Juridiese kragvelde: Die swaartekrag van die Grondwet’ (1998) 26 *Aambeeld* 17.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ T. R. Tyler ‘Multiculturalism and the willingness of citizens to defer to law and to legal authorities’ 2000 *Law & Social Inquiry* 983 at 983–5, 988 and 1000.

large numbers of drug-related prisoners have not lessened drug use, while the level and intensity of law enforcement that is needed to increase the risk of being caught to such a level to ensure compliance is prohibitively high. Tyler highlights morality and legitimacy as two factors that will most likely lead to voluntary obedience. He refers to studies that have shown that people voluntarily defer to authorities who make decisions that they regard as fair. If judges are perceived as neutral, honest, concerned about citizens and respectful of citizens and their rights, most people will feel satisfied with court decisions, and are likely to obey them.⁴⁸

VII THE AUTONOMY OF THE LAW

Law is autonomous and self-referential.⁴⁹ This implies that (official, state-) law is separate from society and relatively 'immune' to society's impulses.⁵⁰

Autopoiesis theory regards law as a self-referential system of communication. Legal communication understands the world in terms of a binary output: legal/illegal or right/wrong or yes/no. Luhmann, one of the exponents of this view of law, regards law as cognitively open but normatively closed.⁵¹ Cotterrell interprets this statement as meaning that law is able to respond to economic, scientific and political events but it interprets these events in its own terms (legal/illegal; yes/no; right/wrong) and uses its own normative criteria that is not dependent on the surrounding environment in which it operates.⁵² Autopoiesis theory then seems to suggest that law cannot be used to steer society at all.⁵³

Cotterrell comments on law's isolation in Western societies and its separateness from other aspects of life.⁵⁴ He mentions a number of examples: ordinary people do their best to avoid courts or litigation; it is mainly lawyers that concern themselves with legal texts such as reported court decisions;⁵⁵

⁴⁸ Ibid.

⁴⁹ Eg B Hepple 'Have twenty-five years of the Race Relations Act in Britain been a failure?' in B Hepple & E M Szyszczak (eds) *Discrimination: The Limits of Law* (1992) 19 at 29.

⁵⁰ Cf Engel op cit note 23 at 168: 'Although the impetus for new law may come from local-level movements and organizations, the norms, procedures and sanctions of law are generally *extrinsic* to particular social domains' (my emphasis).

⁵¹ Luhmann op cit note 23 at 283; N Luhmann 'The self-reproduction of law and its limits' in G Teubner (ed) *Dilemmas of Law in the Welfare State* (1986) 111 at 113-14; Cotterrell op cit note 41 at 65-70.

⁵² Cotterrell op cit note 41 at 67.

⁵³ Luhmann op cit note 23 at 283; Luhmann op cit note 51 at 113-14; Cotterrell op cit note 41 at 65-70.

⁵⁴ Cotterrell op cit note 41 at 16. But F Neumann *The Rule of Law: Political Theory and the Legal System in Modern Society* (1986) 17 is also correct: 'a legal order for its own sake is unthinkable'.

⁵⁵ Cotterrell op cit note 41 at 175 refers to a study by McBarnet that noted that 'case law, originating in the everyday business of the courts, has 'a surprisingly low profile in public affairs' owing, no doubt, to its complexity and detail and the 'convoluted and archaic style in which it is presented'.

lawyers are professionally autonomous, which means that lawyers' typical conceptions of law are very resistant to contrary views of the nature and function of the law; and law is intellectually isolated in that it can be analysed without reference to the actual conditions in which it is supposed to operate.⁵⁶ Elsewhere he comments that most people do not understand many pieces of legislation, and most people are indeed not even aware that most legislation exists.⁵⁷

Bestbier notes that individuals generally feel alienated from legal processes due to ignorance and an accompanying feeling of incompetence and even impotence.⁵⁸ She advocates utilising the primary and secondary school system as a 'nationally inclusive socialising agent'.⁵⁹

Watson presents a compelling argument.⁶⁰ In his view law is largely autonomous and not shaped by societal needs.⁶¹ He uses two propositions to justify his view: (a) legal development has largely been constituted by legal transplantation;⁶² and (b) the legal culture itself determines and controls legal development.⁶³ Lawmakers across societies share the same legal culture: lawyers are creatures of habit, they see laws as ends in themselves, they see law as a specialised field and this leads to an inclination to borrow from one another.⁶⁴ He states:⁶⁵

'[T]o a large extent law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and desires and political economy of the ruling elite or of the members of the particular society on the other hand. If there was such a close relationship, legal rules, institutions and structures would transplant only with great difficulty, and their power would be severely limited.'

It is therefore possible that no relationship will exist between 'law' and 'society'. Watson does however admit that society may influence law. The

⁵⁶ An example from a lecture hall would be my own experience in Property Law during my second year as a law student (in 1991): Not a word was said about the Land Act of 1913 or the racially skewed land distribution in South Africa.

⁵⁷ Cotterrell op cit note 41 at 45.

⁵⁸ A Bestbier 'Legal literacy ? the key to a South African *supra*-culture' (1994) 15 *Obiter* 105 at 107.

⁵⁹ *Ibid* at 108.

⁶⁰ A Watson 'Comparative law and legal change' (1978) 37 *Cambridge LJ* 313; A Watson 'Legal change: Sources of law and legal culture' (1982) 131 *U Pa LR* 1121; A Watson 'Legal evolution and legislation' (1987) *BYU LR* 353; Tamanaha op cit note 16 at 107-9.

⁶¹ Watson op cit note 60 at 1135 and 1136.

⁶² Watson op cit note 60 at 1125 and 1146. Also see D Barak-Erez 'An international community of legislatures?' in R W Bauman & T Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (2006) 532 at 532: 'Learning from other legal systems has always been a *significant technique* for developing law' (my emphasis).

⁶³ Watson op cit note 60 at 1125 and 1136.

⁶⁴ Watson op cit note 60 at 1157.

⁶⁵ Watson op cit note 60 at 314-15.

legal elite's culture may be influenced by social values, and the impetus behind new laws may have their origin in social, economic and political factors. Surrounding circumstances will probably influence transplanted laws. However, there is no direct relationship: 'the input of the society often bears little relation to the output of the legal elite'.⁶⁶

If Watson is wrong, and if a close association exists between a particular society and its laws, one would for example have expected a uniquely 'South African' anti-discrimination Act.⁶⁷ Although the Promotion of Equality and Prevention of Unfair Discrimination Act contains several improvements on typical or 'orthodox' anti-discrimination legislation,⁶⁸ the heart of the Act has been borrowed from elsewhere — that is, the definition of 'discrimination' and the 'fairness/unfairness' enquiry. The definition of 'discrimination' in s 1(1)(viii) of the Act⁶⁹ bears a strong resemblance to the definition of

⁶⁶ Alan Watson *The Evolution of Law* (1985) 17; Tamanaha op cit note 16 at 109. Perhaps the South African experience bears this out. When the final Constitution was drafted, the public was invited to send their submissions to parliament. To my mind the legal elite to a large degree ignored these submissions. Cf C Murray 'Negotiating beyond deadlock: From the Constitutional Assembly to the court' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions* (2001) 103 at 112: 'If the first problem with the statistics is that they do not do justice to the public participation programme, the second is that they conceal the fact that its goals were not always clear and *leave the concrete results of the programme obscure*. In fact, some commentators were openly sceptical, describing the entire programme as an elaborate hoax, *designed to hide the fact that even the final Constitution was to be a negotiated document* and not the democratically-determined one that the ANC claimed it would be. In support of this argument, people pointed to the huge volume of submissions and asked if any politicians could be expected to review all of them. Moreover, these critics may have added, if the politicians had reviewed the submissions they would have found vague wish lists, more often concerned with poverty and the standard of living than with matters more appropriately dealt with in a constitution. The criticism of the process is not entirely unwarranted. Even those who read through the submissions found repetition rather than inspiration and in many painful requests based on deep poverty, they found the legacy of apartheid rather than a design for the future. *But the public participation programme was not intended to provide a list of matters that should be included in the Constitution. Advertising which suggested this . . . might be criticised for being misleading . . .*' (my emphasis). Contra C Ramaphosa 'Foreword' in S Skjelten *A People's Constitution* (2006) 11: 'The [Constitution of South Africa] is remarkable not only for its content, but also for the extent to which the views and interests of ordinary South Africans are reflected in its provisions.' Ramaphosa does not indicate which of the provisions in the Constitution he is referring to.

⁶⁷ Cf Dr S E Pheko (MP, PAC), speech at the second reading debate of the Act, reproduced in S B O Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 51: 'Some elements of the Bill reflect eurocentric arrogance' (in the context of 'outlawing' traditional African customs) and 'This Bill has aspects which are turning this country into a dustbin of the decaying values of the West . . .'.

⁶⁸ See in general C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001).

⁶⁹ "Discrimination" means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly — (a) imposes burdens,

discrimination as set out in *Andrews v Law Society (British Columbia)*,⁷⁰ *Law v Canada*,⁷¹ s 9(1) of the Queensland Anti-Discrimination Act, s 8(1)(b) of the Australian Capital Territories Discrimination Act, and s 4 of the Nova Scotia Human Rights Act. Some of the factors listed in s 14 of the Act (the unfairness enquiry) also appear in s 11(2) of the Queensland Anti-Discrimination Act, s 9(2) of the Victoria Equal Opportunity Act, s 8(3) of the Australian Capital Territories Discrimination Act, s 49C of the New South Wales Anti-Discrimination Act, and s 58(2) of the Northern Territory Anti-Discrimination Act.

VIII ABSENCE OF PROOF OF A CAUSAL LINK BETWEEN LEGISLATIVE CHANGE AND SOCIETAL CHANGE

It is very hard, if not impossible, to ascertain the existence or absence of a causal link between changes in law and changes in society. In the natural sciences laboratory, conditions may be created to isolate and measure the impact of certain factors,⁷² but this cannot be done in a functioning society in the social sciences. Chemerinsky asks how one measures causality, and argues that in modern society a clear causal link between changes in the law and changes in society will be very difficult to prove. Change will probably take place over the long term. In addition, the more far-reaching the intended change, the longer it will take and the greater the variables will be that will play into the process.⁷³ If the intended changes do occur, how does one ascertain if courts (or the legislature) or other social factors caused the change? Handler argues along the same line: when the law changes and effects take place, what is the cause?⁷⁴ He sees law as a moral persuader or educator or a ratifier of changes that have already taken place. Factors such as public opinion, timing, social and economic conditions influence the

obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.'

⁷⁰ [1989] 1 SCR 143, 56 DLR (4th) 1 at 18: 'Discrimination is a distinction based on grounds relating to personal characteristics of an individual or group that has the effect of imposing burdens, or limiting access to opportunities.'

⁷¹ [1999] 1 SCR 497, (1999) 60 CRR (2d) 1 at 36: 'Does the differential treatment differentiate, by imposing a burden upon or withholding a benefit from the claimant . . .'

⁷² For example J M Diamond *Collapse: How Societies Choose to Fail or Survive* (2005) hypothesises on the causes of the decline of (mighty) empires and societies. He identifies environmental damage, climate change, hostile neighbours, friendly trade partners and that society's response to its environmental problems. At 79–119 he considers the lost civilization of the Easter Islands, inter alia because of its remoteness: the nearest lands are Chile, 2300 miles to the east, and the Pitcairn Islands, 1300 miles to the west. By doing so, he can at least exclude the factor 'hostile neighbours'. At 329–57 he considers the Dominican Republic and Haiti, two countries on one island, and by doing so he can focus specifically on 'that society's response to environmental problems'. In the social sciences, these kinds of real-world laboratories do not exist.

⁷³ Chemerinsky op cit note 15 at 192–93.

⁷⁴ Handler op cit note 5 at 37.

possible effect of law, and laws sometimes have completely unintended consequences.⁷⁵

IX ATTITUDES VERSUS ACTUAL BEHAVIOUR

Authors disagree on the ability of law to control or steer attitudes and beliefs, as opposed to observable behaviour. Optimists include Berger, Kidder and Chemerinsky. These authors believe that laws may be used to influence attitudes. Berger is of the view that in an urban and secular society a high number of social relations exist that the law has the ability to influence, and by steering these ‘external acts’, can have an influence on the attitudes behind the external acts.⁷⁶ Kidder cites studies that showed an improvement in racial attitudes after the United States school desegregation decision.⁷⁷ He notes that one way of explaining this improvement is what psychologists call cognitive dissonance — people cannot persistently act in contravention of their conscience, beliefs and values. If law prevents a person from acting in a particular way, people develop new values to fit their altered conduct.⁷⁸ Chemerinsky argues that if a court changes the law and the change in law affects society, it is irrelevant if attitudes change.⁷⁹ He refers to court decisions invalidating Jim Crow statutes:

‘Ultimately the “whites only” signs were taken off restrooms and water fountains and parks and beaches. If this occurred without a change in attitude, it still was valuable and important. Perhaps, too, it caused a change in attitudes over time. Either way, there was an effect, and few would deny that it was positive.’⁸⁰

Then Chemerinsky retreats: public opinion is affected by numerous factors, and to try to ascertain the courts’ role in the process is probably impossible.⁸¹ To charge an undemocratic, insular body (that must interpret an antimajoritarian document) with affecting public opinion is too much to ask.⁸²

⁷⁵ Ibid.

⁷⁶ M Berger *Equality by Statute: Legal Controls over Group Discrimination* (1952) 172.

⁷⁷ Kidder op cit note 22 at 118–19. However at 124 Kidder points out that the same people’s attitudes were not ascertained over time — the studies related to random population selections at three set points in time. He notes that many things happen over time besides people’s exposure to legal decisions. A change in attitude does not necessarily translate into a change in behaviour and perhaps the people questioned gave what they thought to be ‘respectable’ answers to the survey questions.

⁷⁸ Ibid at 118–19.

⁷⁹ Chemerinsky op cit note 15 at 195.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid. Jody Kollapen in *Sunday Times* 3 April 2005 at 18 vacillates on the issue. He relates his own tale of being denied admission to a hair salon ostensibly because the staff couldn’t cut ‘coloured people’s hair’. He decided to lodge a claim with the nearest Equality Court, which awarded R10 000 in damages, to be paid to a charity. At the start of the article he argues that ‘we succeeded . . . in changing the attitudes of a small group of people’. But his conclusion is much more tentative: ‘I will soon visit [the salon] again. *I certainly hope* that when they welcome me as a client *they will do so*

Cotterrell, Pound, Wilson, Allott, Friedman and Rosenberg are less enthusiastic about law's ability to effect changes in beliefs.⁸³ Pound was of the view that law could not be used to control attitudes and beliefs, but could only attempt to control observable behavior,⁸⁴ and Cotterrell, after interpreting works by Pound and Ehrlich, agrees.⁸⁵ Laws must be able to be enforced to influence behaviour.⁸⁶ If laws are to be enforced by state agencies, a high degree of clarity must be sought.⁸⁷ He notes that state-enforced sanctions appear to be useless in many areas of social life and tend to disrupt, rather than harmonise, social relations.⁸⁸

Wilson believes that law has a limited role in causing societal changes. He believes that public opinion changes because dramatic events take place: for example, a war or a depression, because of extraordinary leadership, or a repeated circulation of ideas in the media.⁸⁹ In other words, public opinion does not change because a law prescribes that it should change.

Allot believes that people obey laws because they see it being to their advantage to do so, or because they have formed the habit to do so, or because the appropriate authority has put in place an effective compliance-ensuring mechanism.⁹⁰ He does not seem to pay much heed to the moral pressure that laws possibly exercise. He refers to the notion of superficial conformism: people who sense that their opinions are in conflict with the official line will keep their opinions to themselves and outwardly conform to what seems to be the approved version.⁹¹

Friedman believes that people are selective; they choose which laws they approve of and choose specific laws to strengthen already-held beliefs about right and wrong.⁹²

Rosenberg is very pessimistic about a court's ability to change popular

not because of the compulsion of a court order but because the experience they endured has taught them to accept and respect me as a fellow South African . . .' (my emphasis).

⁸³ Sen op cit note 9 at 254 may also be added to this list. He states that on matters of attitudinal change, legislation would be difficult and most likely quite ineffective.

⁸⁴ R Pound 'The limits of effective legal action' (1917) 3 *American Bar Association J* 55; Cotterrell op cit note 41 at 51.

⁸⁵ Cotterrell op cit note 41 at 51.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid at 52.

⁸⁹ As discussed by Handler op cit note 5 at 39. Handler at 220 puts it somewhat differently: 'Wilson . . . argue[s] that social change only really comes about by dramatic events, political entrepreneurs, or the gradual change of public opinion.' From this perspective, one could argue that it was not the enactment of the interim Constitution that led to greater tolerance between the polarised racial groups in South Africa, but incidents such as President Mandela's appearance in a Springbok jersey at the 1995 Rugby World Cup.

⁹⁰ Allott op cit note 37 at 40.

⁹¹ Ibid at 231–2.

⁹² Friedman op cit note 23 at 111–24; Handler op cit note 5 at 218.

beliefs.⁹³ He refers to the American Supreme Court *Dred Scott* decision that upheld the constitutionality of slavery on the eve of the outbreak of what would come to be known as the American Civil War. The court's ostensible purpose was to avoid that war but instead it only 'fanned the flames'.⁹⁴ Rosenberg writes 'when emotions run high, as they do over issues of equality, one might think it unlikely that the Court's decisions would change opinions'.⁹⁵ He makes the common sense assumption that to be able to influence opinions, people must know what courts do.⁹⁶ However, most Americans are largely ignorant and care very little about courts, including the Supreme Court. He refers to a few studies: In 1966, 40 per cent of the American public could not identify Earl Warren and in 1989, less than 10 per cent could name the chief justice. In 1966, 46 per cent of the survey population could not recall anything that the Supreme Court had done in the recent past.⁹⁷ The court also receives very limited press coverage.⁹⁸ Studies of newspaper coverage of issues relating to African Americans after *Brown* do not indicate an increase in coverage relating to racial equality; coverage only improved with the massive demonstrations of the 1960s. Surveys in the American South following *Brown* contain no indication that the decision facilitated a change of heart, and Rosenberg concludes that people supportive of integration were probably supportive of it before *Brown*. African Americans also did not show enthusiastic support for *Brown*. Rosenberg refers to similar studies relating to abortion,⁹⁹ affirmative action, women's rights and sexual orientation and concludes: 'The findings are consistent: there is no evidence supporting the power of the Court to increase support for racial or gender equality.'¹⁰⁰ He argues that the reason for courts' inability to influence attitudes is as follows:¹⁰¹

'As anyone who has ever debated issues of racial or gender equality can attest, opinions on such issues are often deeply held. It is naïve to expect an institution seen as distant and unfamiliar, shrouded in mystery, and using arcane language and procedures to change people's views.'

South African empirical research tends to disprove Davis's view that 'the judiciary shapes public opinion'.¹⁰² The Human Sciences Research Council

⁹³ GN Rosenberg 'The irrelevant court: The Supreme Court's inability to influence popular beliefs about equality (or anything else)' in N Devins & D M Douglas (eds) *Redefining Equality* (1998) 172 at 173.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid at 174.

⁹⁷ Ibid.

⁹⁸ Ibid at 174–5.

⁹⁹ S Rule & B Mncwango 'Rights or wrongs? An exploration of moral values' in U Pillay, B Roberts & S Rule (eds) *South African Social Attitudes: Changing Times, Diverse Voices* (2006) 252 at 270 report that American attitudes relating to abortion had not varied significantly in the last decade.

¹⁰⁰ Rosenberg op cit note 93 at 187.

¹⁰¹ Ibid.

¹⁰² Dennis Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 11.

conducted a 'South African Social Attitudes Survey' in 2003, the results of which were published in 2006.¹⁰³ This study indicated that the South African public's attitude relating to issues such as the death penalty, sexual orientation and abortion are 'out of sync with government policies'.¹⁰⁴ The authors of the study conclude that 'South Africans still come across as . . . racist, homophobic, sexist, xenophobic and hypocritical',¹⁰⁵ and that 'ten years of democracy seem to have done little to moderate what can be described as hard-line, authoritarian attitudes on such politico-social issues as capital punishment and gay sex'.¹⁰⁶ A number of Constitutional Court judgments have been handed down where the values of compassion and tolerance have been preached.¹⁰⁷ These judgments have clearly not found their way into the hearts of South Africans.

¹⁰³ Pillay et al op cit note 43.

¹⁰⁴ U Pillay 'Introduction' in Pillay et al op cit note 43 at 10. Rule & Mncwango op cit note 99 at 272 argue that '[South Africa's] new Constitution and legal regime are thus at odds with the core beliefs of a large proportion of its electorate', while M Orkin & R Jowell 'Ten years into democracy: How South Africans view their world' in Pillay et al op cit note 43 at 279 note that 'despite South Africa's extremely progressive Constitution, the majority of South Africans are still very traditionalist on all these moral issues'.

¹⁰⁵ Pillay op cit note 104 at 10; J Daniel, R Southall & S Dippenaar 'Issues of democracy and governance' in Pillay et al op cit note 43 at 20.

¹⁰⁶ Daniel et al op cit note 105 at 20. At 36 the authors state that, based on the survey, despite the Constitutional Court judgment outlawing the death penalty (*S v Makwanyane* 1995 (2) SACR 1 (CC)), 75 per cent of South Africans favour, and 50 per cent strongly favour, the reintroduction of the death penalty for murder. Despite s 12(2)(a) and (b) of the Constitution and *Christian Lawyers' Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T), 74 per cent of respondents regard abortion to be wrong in some respect, with 56 per cent of respondents disapproving of abortion even where there is a strong chance of the baby suffering a serious defect. Despite a ruling such as *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 78 per cent of respondents thought gay sex was always wrong. (A 1995 HSRC survey of public opinion showed that 54 per cent of respondents were strongly opposed, and 10 per cent of respondents somewhat opposed, to equal rights for heterosexual and homosexual marriages: Rule & Mncwango in Pillay et al op cit note 43 at 255. An empirical study conducted in 2004 showed that more than 50 per cent of the black gay respondents interviewed felt that the broader South African society's attitudes towards homosexuals had not improved since the coming into effect of the new constitutional order: *Beeld* 17 January 2007 at 9.) A Dawes, Z D Kropiwnicki, Z Kafaar & L Richter 'Partner violence' in Pillay et al op cit note 43 at 239 report that 75 per cent of women in three provinces thought that it was sometimes acceptable for adults to hit each other, and more than 50 per cent of girls between 10 and 19 years of age thought that forcing sex on someone you knew was not sexual violence, despite s 12(1)(e) and (e) in the Constitution, and cases such as *S v Baloyi (Minister of Justice intervening)* 2000 (2) SA 425 (CC) and, more to the point, *S v Njikelana* 2003 (2) SACR 166 (C).

¹⁰⁷ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (1) SACR 431 (CC) paras 57, 79, 147; *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (2) SACR 540 (CC) para 147; *S v Makwanyane* 1995 (2) SACR 1 (CC) paras 249, 308, 369, 391; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 38; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 102.

X THE ARTIFICIALITY OF LEGAL CLASSIFICATIONS

A ninth approach is to argue (sometimes implicitly) that legal classifications are artificial. People do not function according to legal precepts; legal principles are mental constructs to find a solution ‘after the fact’. When the incident that forms the background to the ensuing court case occurred, the legal principles were absent. The implication is clear — law plays (virtually) no role in influencing human behaviour; legal rules come into play after the event to ‘solve’ a ‘problem’. Permit me a detour to expand on this proposition.

Jeffrey seems to believe that in the majority of cases it is completely wrong to think of legal rules having ‘governed’ behaviour.¹⁰⁸ He points out that in most civil and criminal cases, the so-called ‘rules’ that are supposed to govern human behaviour only come into play *after* the incident. He uses an example from contract law to explain his view. Suppose two businesspeople draft a shipping contract but, for whatever reason, fail to include a provision that will determine what should happen if the cargo does not arrive safely or is delayed. Assuming the cargo does not arrive and the parties fail to reach a settlement, the matter proceed will proceed to court where lawyers use whatever methods are available to ‘cope with the situation’; to talk of the rules of contract law ‘governing’ the parties’ behaviour is fallacious.¹⁰⁹ Similarly, the rules of law of delict cannot be said to have regulated drivers’ behaviour involved in a motor accident (unless they were both lawyers, perhaps).¹¹⁰ Boshoff states that:

[E]veryday life, and the slices of everyday life that appear before the courts, do not readily fit into the classifications that the law forces upon them. There are, however, always and only situated contexts of action, with real people in real situations, imbued with all the particularities of history, culture and preconceived value.¹¹¹

In the South African context, a study by Joubert provides a striking example of Jeffrey’s hypothesis.¹¹² The legislature (and presumably courts as well) assume that people will take cognisance of the law when ‘planning’ their behaviour — why else shall we bother drafting and applying laws in the first place? But Joubert’s study would suggest that law plays virtually no role in people’s daily decisions. In November 1982, more than a decade before the advent of a democratic South Africa, a coloured school principal had to write an Afrikaans-Dutch examination together with three white students in a small town in the Cape countryside. They were all students at a

¹⁰⁸ Jeffrey op cit note 23 at 34–5.

¹⁰⁹ Compare what a South African businessman said in testimony in *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 491 (SCA) para 38: ‘It is not our practice to finalise our deals in a court of law, that certainly doesn’t appeal to us at all.’

¹¹⁰ Jeffrey op cit note 23 at 34–5.

¹¹¹ A Boshoff ‘Revisiting the ideal of the impartial judge’ 2002 *TSAR* 756 at 758–9.

¹¹² D Joubert ‘“Wat reg is, is reg”: ’n Inhoudsontleding van sosiologika by ’n kleur-insident’ (1991) 22 *SA Journal of Sociology* 59.

non-residential university. A minister of the local Reformed Dutch church acted as invigilator and thought it prudent to let the school principal write his examination separate from the three white candidates. The white candidates wrote their examination in the vestry while the principal wrote his examination in the kitchen. The principal approached the media after the incident and for a number of weeks especially *Die Burger*, a mainstream-Afrikaans Cape-based daily newspaper, covered stories, statements and letters from readers on the incident. Joubert analysed the reasons given by various parties either condemning or defending the minister's decision. He divided the various reactions into twelve categories:

The so-called 'immediate reactions' all condemned the minister and included judgments such as insulting (vernederend), disgusting, irresponsible, unfortunate, cold rage, insensitive (onsensitief), shocking (ontstellend and skokkend), without tact (taktloos), sad (hartseer) and 'a match that should never have been struck' ('n vuurhoutjie wat nooit getrek moes gewees het nie'). The second-highest number of reactions (84) related to the minister personally. 41 of these reactions condemned him; 43 defended him. Of the reactions condemning him, only one used a legalistic term: 'the minister regards discrimination as a right' ('hy beskou diskriminasie as reg'). Nineteen reactions commented on the room allocated to the principal. Only four reactions mentioned local conditions: 'Parishioners would have felt aggrieved had he allowed the principal to write together with the white students.' ('gemeentelede sou andersinds beswaard voel'); 'the public did not have regard to the minister's action in his particular circumstances . . .' ('publiek sien nie dominee se optrede teen agtergrond van omstandighede nie . . .'); 'the townsfolk's profile includes very conservative and very liberal/progressive people . . .' ('die dorp wissel van uiters konserwatief tot uiters liberal . . .'); 'minister's task is difficult in a *Boland* town . . .' ('taak nie so maklik op so 'n Bolandse dorp nie . . .'). Twelve reactions related to organisational regulations. Six reactions related to the minister's position and role expectation. The highest number of reactions (85) had church and religion as its focus. 78 reactions condemned the incident; seven defended it. The category 'politics and state policy' included seventeen reactions. 'Folkways' accommodated 73 reactions, fifteen defending the minister and 58 condemning him. Three of these reactions explicitly referred to 'discrimination': 'this is a kind of race discrimination, possibly even racism . . .' ('hierdie is 'n soort rassediskriminasie, moontlik selfs rassisme. . .'); 'all of us discriminate indirectly . . .' ('ons almal wat onregstreeks diskrimineer. . .') and 'it is almost impossible to negotiate a better future when such daily instances of discrimination occur . . .' ('dis byna bomsenslik om 'n beter bedeling te beding met sulke daaglikse diskriminasie. . .'). Thirty-two reactions related to the media's role in the controversy. Joubert allocated thirteen reactions to the category 'values'. All of these reactions condemned the incident as 'unChristian'. And finally, fourteen reactions focused on image.

One could differ about the categories that Joubert chose, as it is not always clear why a particular reaction was not classified under another heading, and

some reactions could plausibly be categorised under more than one heading. It should also be pointed out that the incident occurred in 1982, some eight years before F W de Klerk's speech in which he announced to Parliament the release of Nelson Mandela, and more than a decade before the first democratic elections. Perhaps more crucially, in 1983 the ruling National Party introduced a new Constitution, whereby so-called 'coloureds' and Indians received limited representation in Parliament. The incident was mainly covered in the Afrikaans press (very few of the reactions were recorded in English) and it is at least arguable that *Die Burger*, one of the National Party's mouthpieces at the time, wished to use the incident to illustrate that the majority of Afrikaners deplored bad treatment of 'coloureds'. Had the principal been African, I doubt whether the same proportion of reactions condemning the minister's behaviour would have been recorded.

That being said, it is still of value to consider to what extent the correspondents utilised the law or legal concepts to justify or condemn the minister's behaviour. Joubert listed more than 370 'reasons' why the minister should or should not have acted in the way that he did. Very few of the proffered reasons invoked the law, and of those that did, did so very indirectly — only five correspondents used the phrase 'discrimination', and only a further seventeen respondents referred to apartheid as state policy directly or implicitly. Had the matter proceeded to court, trained lawyers would not have used any of the offered arguments as they would have been regarded as 'irrelevant'. Had the matter proceeded to court in 1982, perhaps some obscure part of apartheid legislation would have been used to justify the minister's conduct. Had a similar event occurred in post-1994 South Africa, the Constitution or the Equality Act would have been in play and lawyers would have argued about the absence or presence of 'discrimination', as defined in the Equality Act, and whether the discrimination, if proven, was 'fair' or 'unfair'.¹¹³ In other words, had any of these correspondents been

¹¹³ Mark Tushnet, as set out by K W Crenshaw 'Race, reform, and retrenchment: Transformation and legitimation in antidiscrimination law' (1988) 101 *Harvard LR* 1331 at 1353 says that the language of rights 'undermines efforts to change things by absorbing real demands, experiences, and concerns into a vacuous and indeterminate discourse'. He provides the following example at 1353n85: 'When I march to oppose United States intervention in Central America, I am "exercising a right" to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of whom I disagree profoundly, getting cold, feeling alone in a crowd, and so on. It is a form of alienation or reification to characterize this as an instance of "exercising my rights". The experiences become desiccated when described in that way.' But who describes a march as 'exercising our rights', barring a few pretentious lawyers? Ordinary people will describe their outing in precisely the same terms that Tushnet does: being with friends, getting to know people, getting cold. Law does not intrude. Law does not alienate. Law is simply mostly absent. Should the extraordinary occur and a case ends up in court, ordinary people will describe the outing in ordinary words to their lawyers and the court, and the lawyers will use 'rights-talk' to argue the case in court. The experience in court may be

faced with the minister's situation, and assuming that they would have acted in accordance with their 'reasons',¹¹⁴ 'the law' would not have featured significantly in shaping their decision as to what to do.¹¹⁵

XI CONCLUSION

I would argue that many laws are drafted with the unrealistic assumption that law features large in the lives of ordinary South Africans.¹¹⁶ In the context of anti-discrimination laws specifically, consider for a moment the Cronjé-Davids rugby controversy that erupted a few weeks prior to the 2003 Rugby World Cup. Cronjé, a white player, allegedly refused to share bathroom facilities with Davids, a 'coloured' player from another provincial side and a rival for the same position in the final national squad. The incident was widely reported in the media. The same pattern that I have identified from Joubert's study emerges again. Very few commentators, if any, refer to 'the law' in criticising or defending Cronje's decision. Comments relating to the incident could broadly speaking be divided into four categories: racism, interaction between rugby players, emotive reactions, and comments linking

alienating to a layperson, but this is not unique to law and the legal profession. I complain to my doctor in 'ordinary' words and he responds in medical jargon. He scribbles a prescription in illegible handwriting, leaving me bewildered. When my brother, a mechanical engineer, talks about his latest project, I am lost.

¹¹⁴ It could be argued that verbalisation and internalisation are two separate matters; that the mere fact that 'the law' (as such) is not articulated is not necessarily indicative of the fact that the law plays no part in the life worlds of individuals.

¹¹⁵ I acknowledge that there are limits to this argument. The selection of 'arguments' is not representative as only views expressed in newspapers were taken into account. I also assume that every commentator would have acted in the way that they expressed themselves; i.e. if someone had reacted negatively to the minister's behaviour, that they would have let all the candidates write in the same venue. If one collects data on human behaviour; if one wants to know why people acted in a particular way, you either have to *imagine* it — but this is a socially conditioned process — or you have to *ask* them, but then one gets 'in order to' and 'because of' motives. '[T]he response to [the] question is filtered through the same social process: whatever the motivation might have been before the act, what we get is a statement of motivation that makes sense of the act after it has happened.' R. Dingwall 'Language, law, and power: Ethnomethodology, conversation analysis, and the politics of law and society studies' (2000) 25 *Law and Social Inquiry* 885 at 891.

¹¹⁶ I would argue that whenever a social problem arises, a general tendency is to call upon Parliament to legislate to address the situation. South African examples of such calls on Parliament include: the need for a 'Bill of Morals' (*The Star* 21 May 2005 at 1, *Sunday Argus* 22 May 2005 at 18, *Saturday Weekend Argus* 21 May 2005 at 3); safety at sport stadiums (*Business Day* 31 May 2006 at 8); anti-smoking provisions (*Star* 8 March 2007 at 14, *Beeld* 5 June 2003 at 4); transformation in sport (*Beeld* 9 April 2003 at 1); trauma caused to animals due to fire works (*Beeld* 6 January 2003 at 5, *Citizen* 4 January 2003 at 6); pirating of computer software (*Sunday Times Business Times* 19 January 2003 at 7); road traffic deaths (*Beeld* 21 January 2003 at 4); maintenance defaulters (*Mail & Guardian* available at http://www.mg.co.za/articledirect.aspx?area=mg_flat&articleid=10070, accessed on 6 August 2007); and minimum wages for domestic workers (*Beeld* 16 August 2002 at 1).

the incident to the broader South African society.¹¹⁷ The vast majority of reactions linked the incident to racism.¹¹⁸ The second-largest group of reactions focused on the nature of the interaction between rugby players and between players from different provincial sides.¹¹⁹ About seven of the clippings I collected referred to the incident in emotive terms¹²⁰ and three reactions tied the incident to the broader South African situation.¹²¹

¹¹⁷ I do not suggest that the newspaper clippings that I collected amount to a representative sample.

¹¹⁸ I inter alia collected the following reactions: 'there were no racist words . . .' ('daar was geen rassistiese woorde') (*Beeld* 5 September 2003 at 3); '[I]s South African rugby racist? The answer may be yes, depending on your parameters.' (*Mail & Guardian* 5 September 2003 at 56); 'there was not conclusive evidence that this activity was based on racism' (*Mail & Guardian* *ibid*); '[Coach] Straeuli and his squad insist racism played no part in the players' decision to change rooms last week.' (*Sunday Times* 7 September 2003 at 21); 'the controversy now includes full-blown accounts of racism and deceit . . .' (*Sunday Times* *ibid*); 'racism cover-up . . .' (*Sunday Times* (*ibid* at 1)).

¹¹⁹ Some of the reactions included: 'Dale Santon asked whether he would have been guilty of racism if he asked to share a room with Davids, one of his friends.' ('Dale Santon het gevra of hy ook aan rassisme skuldig sou wees as hy gevra het om saam met Davids, een van sy vriende, 'n kamer te deel.') (*Beeld* 5 September 2003 at 1); '[A]s to the alleged incident of racism between Geo Cronjé and Quinton Davids, the Bok Captain said that it often happens that players swap rooms for various reasons. In this case it was wrongly interpreted as racism.' ([W]at die beweerde voorval van rassisme betref waarin Geo Cronjé en Quinton Davids na bewering betrokke was, het die Bok-kaptein gesê dit gebeur gereeld dat spelers om verskeie redes van kamer verander. In hierdie geval is dit verkeerdelik vertolk as rassisme') (*Beeld* *ibid* at 3); '[I]t was a simple swop as players normally do . . . team management did not allow it this time and Cronjé went back to rooming with Davids before it blew up as a race issue in the papers.' (*Sunday Times* 7 September 2003 at 30); 'Why is it racism when Geo and Quinton swop but not when Victor and AJ do it?' asked an irate Werner Greeff.' (*Sunday Times* 7 September 2003 at 30); 'You're dealing with 30 players and not all of them are the best of friends. Without being involved, it's very difficult to say if it could have been done differently.' (*Sunday Times* *ibid*); 'They are competing for the same position in the World Cup squad. It is understandable that there could have been friction between them.' ('Hulle ding albei mee om dieselfde plek in die Wêreldbeker-groep. Dis te verstane dat daar wrywing tussen hulle kon gewees het.') (*Beeld* 29 August 2003 at 3).

¹²⁰ 'Race storm' ('Rassestorm') (*Beeld* 6 September 2003 at 8); 'race racket' ('rasseherrie') (*Beeld* 5 September 2003 at 1); 'race drama' ('rassedrama') (*Beeld* 5 September 2003 at 3); 'Bok crisis' (*Rapport* 7 September 2003 at 1); 'a scandal' ('n skandaal') (*Rapport* 31 August 2003 at 1); 'rugby race row' (*Sunday Times* 7 September 2003 at 7); 'a racism bomb' ('n rassisme-bom') (*Beeld* 29 August 2003 at 1).

¹²¹ 'In the greater scheme of things South African rugby is absolutely irrelevant. The ideals of the Rainbow Nation are in tatters not because of a few muddled oafs with funny shaped balls, but because a decade of free and fair governance has taught us one important lesson: we actually don't like each other very much.' (*Mail & Guardian* 5 September 2003 at 56); 'Race is a factor in South African rugby, as it is a factor in all facets of our daily living. What is important is how it is treated. If every racial incident in South Africa leads to the kind of polarisation that we have seen over the past ten days, our days are numbered.' ('Ras is 'n faktor in Suid-Afrikaanse rugby, soos dit 'n faktor is in al die fasette van ons alledaagse bestaan. Hoe dit hanteer word, is wat tel. As elke voorval in Suid-Afrika met 'n ras-element lei tot die soort polarisasie wat

I could not locate a single reference to the Equality Act or a debate as to whether Cronjé ‘fairly’ or ‘unfairly’ ‘discriminated’ against Davids, which would have been the lawyerly way of ‘solving’ the ‘problem’ — the way such an incident is treated in terms of the Constitution and the Equality Act.¹²² If ordinary people do not refer to the law in criticising or justifying similar incidents, why would the law have any influence in their daily decisions? As Marcus puts it, ‘people . . . don’t seem to think legalistically or in terms that are derived from the law’.¹²³ The entire incident could have played out very differently. Cronjé could have decided to say nothing and could have stayed in the room. Davids could have decided to say nothing. Apparently Davids overslept and that is how the team management discovered that the players had swapped rooms. Had he not overslept, nothing may ever have become known. Somehow the media heard about the incident — had that not happened, the incident may well have been covered up. These are only some of the possible outcomes, and ‘the law’ played no part in the outcome of any of these scenarios. ‘The law’ can always step in afterwards, but to do what exactly? The damage has been done: an after-the-fact analysis of what each of the role players said or did or did not say or did not do plays no role in steering or driving anyone’s behaviour. The Austinian concept of law as command assumes that citizens will obey all laws, lest they be subjected to sanctions. The above exposition suggests that this approach to law is flawed. The underlying assumption about legal rules is that humans are rational beings and that they will direct their behaviour according to legal principles, but at best humans are a-rational.¹²⁴

die afgelope tien dae aanskou is, kan ons maar by voorbaat Ikabod skryf oor die toekoms.’) (*Rapport* 7 September 2003 18); ‘Madiba has on various occasions said that we must all realise that racism still exists in South Africa. It will not suddenly disappear. People were raised with certain values and it takes time to change those values. He believes it must be eradicated over time and therefore he advised Strauveli and minister [of sport] Balfour not to tolerate it.’ (‘Madiba het al by verskeie geleenthede gesê ons moet almal besef dat daar nog rassisme in Suid-Afrika bestaan. Dit is nie iets wat oornag kan verdwyn nie. Mense is grootgemaak met sekere denkwyses en dit verg tyd om daardie denkwyses te verander. Hy glo dit moet mettertyd uitgeroei word en daarom het hy vir Strauveli en minister [van Sport] Balfour aangeraai om dit nie te duld nie.’) (*Rapport* 7 September 2003 at 1).

¹²² Griffiths op cit note 43 at 316 states that people’s interpretation of what happened to them depends on their social surroundings, not the law.

¹²³ Marcus op cit note 13 at 248.

¹²⁴ Fukuyama op cit note 23 at 105; L A Stout ‘Social norms and other-regarding preferences’ in J N Drobak (ed) *Norms and the Law* (2006) 13. P Berger ‘Social change and the vocation of sociologists’ (1991) 22 *SA Journal of Sociology* 73 at 73–7 highlights four relatively recent events that have occurred since the Second World War that were not foreseen by sociologists: (a) the cultural and political turmoil in Western countries in the late 1960s and early 1970s; (b) the rapid economic growth of newly industrialised countries in the East in the 1970s and onwards; (c) the Iranian revolution and (d) the quick collapse of the Eastern European communist regimes. He laments the fact that sociologists generally fall into two camps; what he calls ‘ideologists’ and ‘trivialisers’. The ideologists imagine a ‘bigger picture’ that simply does not

Even authors who believe that law has a potentially meaningful role to play impose severe constraints on this possibility. For example, Evan puts forward seven conditions that would allow law to play an ‘educational function’.¹²⁵ His second condition prescribes that a new law must ‘clarify its continuity and compatibility with existing institutionalized values’.¹²⁶ Read with his fourth condition — ‘law must make conscious use of the element of time in introducing a new pattern of behaviour’¹²⁷ — it seems that at best he suggests that a new law will have (some) effect only over the (very) long term. A radical departure from ‘institutionalised values’ will then probably never be implemented. His final condition, ‘effective protection must be provided for the rights of those persons who would suffer if the law were evaded or violated’,¹²⁸ could be unattainable in a resource-limited country, especially if a large number of agitated defendants exist.¹²⁹ Morison’s ‘advice to Machiavelli’s Prince today as to the limits and possibilities of law’ leads to the same conclusion.¹³⁰ His first condition, ‘the goal of the lawmaker must be realizable through law’,¹³¹ and his fourth condition, ‘the required change

exist; the trivialisers see the minute parts but does not realise that it is part of something bigger. He says that the social sciences are children of the Enlightenment and that they are based on a *basic erroneous assumption about the rationality of human action* (my emphasis.) Aubert op cit note 23 at 141 puts it thus: ‘Underlying our presentation of reasons for preferring an alternative conflict-solving device, there is the *assumption of rationality* on the part of the actors. It is rational to act in accordance with the minimax principle, to save time and money, to shun publicity. However, *this assumption of rationality is not always realistic*; nor is it always correct to look upon the individual actor as a separate entity, free from ties to other actors.’ (My emphasis.) He also says, at 142: ‘Rationality is a difficult concept. Unusual steps may appear irrational because they are unsuited to furthering the welfare of the actor in the conventional sense. *However, an actor may be prompted by a desire to realize unusual values, for the achievement of which these apparently irrational means are suitable.*’ (My emphasis.) Also cf R Fuller ‘The forms and limits of adjudication’ (1978) 92 *Harvard LR* 353 at 360: ‘[A] more general criticism that may be directed against the whole analysis being presented here, namely that it grossly overstates the role of rational calculation in human affairs. It forgets that men (sic) often act in bland conformity to custom, in passive acquiescence to authority, and — sometimes at least — in response to inarticulate impulses of altruism. But there is no intention here to deny that the springs of human actions are diverse and often obscure’.

¹²⁵ W M Evan ‘Law as an instrument of social change’ in W M Evan (ed) *The Sociology of Law: A Social-Structural Perspective* (1980) 554 at 557–61.

¹²⁶ *Ibid* at 558.

¹²⁷ *Ibid* at 559.

¹²⁸ *Ibid* at 560.

¹²⁹ Assume for a moment that a hundred thousand wives wished to sue their hundred thousand husbands to share the household burdens equitably. My example is not absurd. Section 8(d) of the Equality Act outlaws ‘any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child’.

¹³⁰ Morison op cit note 13 at 8.

¹³¹ *Ibid* at 9.

must be able to be implemented',¹³² leads nowhere, as he does not answer the question *when* the lawmaker's goal will be realisable and *when* the change will be able to be implemented.¹³³ Morison also insists that the 'purpose behind the legislation must be compatible to existing values to a degree',¹³⁴ which also implies that radical change will take a long time to be realised.

At first blush authors such as Chemerinsky and Budlender seem to come to a different conclusion and seem to be much more positive about the potential effect of utilising the law to effect change. Chemerinsky ostensibly argues that courts 'make a difference' and that changes in the law lead to changes in society.¹³⁵ However, a careful reading of his argument reveals that he has a very narrow definition of what would constitute 'effective' court action. He seems to argue that an anti-discrimination Act would be effective if it provides redress to injured *individuals*.¹³⁶ He uses tort law as an example: tort law is effective because it compensates innocent victims, although it may not deter dangerous products and practices.¹³⁷ He takes solace from *Brown v Board of Education* because it was an 'enormously important' statement of equality, although it had little effect.¹³⁸ He argues that court cases upholding the (American) Constitution protect key values and therefore have 'great social importance', even if no social change flows from the cases.¹³⁹ He correctly argues that categorical statements about the (lack of) ability of courts to achieve social change must be avoided,¹⁴⁰ but he does not provide a single example of a court case that has led to social change. If anything, he provides examples where courts have *frustrated* social change.¹⁴¹ Budlender optimistically refers to *Minister of Health v Treatment Action Campaign (No 2)*¹⁴² as an example where court action successfully led to changes in government policy and the provision of treatment to (poor) people living with HIV.¹⁴³ But in another decision by the Constitutional Court relating to socio-economic rights, *Government of the Republic of South Africa v Grootboom*,¹⁴⁴ very little happened in its aftermath. Three years passed before the national government put in place an emergency housing programme that to date has

¹³² Ibid.

¹³³ Morison *ibid* rather unhelpfully suggests that world peace or a happy Christmas is beyond the scope of the legislature.

¹³⁴ Ibid.

¹³⁵ Chemerinsky *op cit* note 15 at 191–203.

¹³⁶ Ibid at 193, my emphasis.

¹³⁷ Ibid.

¹³⁸ At 198–9 Chemerinsky is quite candid about *Brown's* failure. A decade after *Brown* only 1.2 per cent of black schoolchildren were attending school with whites, and in present day America racial separation is increasing.

¹³⁹ Ibid at 193.

¹⁴⁰ Ibid at 201.

¹⁴¹ Ibid at 201–2.

¹⁴² 2002 (5) SA 721 (CC).

¹⁴³ G Budlender 'Implementing judgments on the positive obligations of states' (2006) 15 *Interights Bulletin* 139 at 140.

¹⁴⁴ 2001 (1) SA 46 (CC).

not been adequately implemented.¹⁴⁵ Budlender argues that to be effective, civil society organisations must pressurise government to comply with court orders and the public media must pursue the particular matter.¹⁴⁶ My argument is not that without litigation, government policy and treatment would have changed — of course litigation brought about the intended change in this instance. My point is that for this kind of court action to be effective, enormous organisational ability, energy, effort and money must be available, which does not happen as a matter of course.

Dror is probably correct: law seems to be the quickest and cheapest way of changing a society and that is why governments too readily turn to the law when it wishes to dispose of a social ill.¹⁴⁷ In this belief governments are often probably mistaken.¹⁴⁸

¹⁴⁵ Budlender op cit note 143 at 139.

¹⁴⁶ Ibid at 139 and 140.

¹⁴⁷ Dror op cit note 1 at 802. Also cf Dawes et al op cit note 106 at 240, who argue that the solution to combating partner violence in South Africa lies in the effective implementation of domestic violence legislation. I would suggest that law will have an extremely limited impact in such intimate settings.

¹⁴⁸ Dror op cit note 1 at 802. And perhaps, naively, legislatures truly believe that people will obey laws that have been enacted: cf *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) para 31; the speech by J O Tlhagale (MP, UCDP) at the consideration of the Bill in the National Council of Provinces, 28 January 2000 (reproduced in Gutto op cit note 67 at 82): 'No longer will any anybody call anyone derogatory names, no longer will anybody discriminate against anyone on the basis that he or she has no struggle credentials and no longer will anybody discriminate against anyone on the basis of race, gender or disability'; and the speech by M P Themba (MP) at the same occasion (Gutto op cit note 67 at 87): 'There are many more areas in which the implementation of this Bill will have *immediate and positive effect*.' (My emphasis.) L Lustgarten 'Racial inequality and the limits of the law' (1986) 49 *Modern LR* 68 at 84–5 is more cynical: 'It is impossible to say whether the preference for a legal approach was based upon an exaggerated faith in the efficacy of law; or the need, for political reasons, to be seen to do something highly visible, such as enacting a statute; or was a conscious alternative to taking on a wider long-term expensive and controversial commitment.' Also cf D Unterhalter 'Legislation in a democratic and open society', paper presented at a conference entitled 'Liberty and Prosperity: Principles of Good Law in a Complex Society', Sandton, 27 July 2000 (published conference proceedings in author's possession) at 38: 'I do think that to some extent we are the *victims of the notion that law cures everything*. We do have this rather imperial view that lawyers and decisions by law-making tribunals of one sort or another *can always rectify every problem* or produce every kind of social good that we want. And sometimes in my view it is better to take a more modest view of what one can achieve, and achieve it better, than to put grand schemes in place.' (My emphasis.) (At page 34 of the published conference proceedings he notes that there are mainly two approaches of viewing law and the role of the state: 'On the one hand, a large and dominant state is welcomed. From this view, what was wrong with apartheid was that it was applied to the wrong object. The opposite view is that liberty and dignity must be seen as the founding values of society and that the state should have a diminished role.' If one accepts Unterhalter's analysis, a programme of social change being driven via law depends on a dominant, capacitated state. Fukuyama op cit note 23 argues in this vein.)